

LA16-9
(cont'd)

EIS that fails to disclose the actual impacts of the project. *See Santiago County Water Dist. v. County of Orange*, 118 Cal.App.3d 818, 829 (Cal. Ct. App. 1981). Thus, as one court emphasized, “[a]n accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR.” *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 192 (Cal. Ct. App. 1977).

For example, in *Santiago County Water Dist.*, 118 Cal.App.3d 818, an EIR for a sand and gravel mining operation was found inadequate because the project description omitted mention of the construction of water delivery facilities that were an integral part of the project. The court concluded that, because of this omission, important aspects of the project remained hidden from public review, in violation of CEQA. *Id.* pp.829-30. Similarly, in *Whitman v. Board of Supervisors*, 88 Cal.App.3d 397, 414-15 (Cal. Ct. App. 1979), an EIR prepared for a test oil well project failed to consider the environmental impacts associated with an oil pipeline to service the facility. In *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal.App.4th 713, 721-22 (Cal. Ct. App. 1994), a project description for a housing development did not include the expansion of a public wastewater treatment plant. The court held that the description was legally inadequate because the expansion was an integral component of the project. *Id.* p.734. Thus, as under NEPA, the DEIS here fails to satisfy CEQA’s requirement to provide a full description and analysis of the proposed Project.⁹

⁹ In addition, based on this flawed description of the Project and the Project area, the Agencies failed to name the District as a responsible/trustee agency under CEQA. *See* Cal. Pub. Res. Code §§ 21069, 21070, 21104, 21153.

Local Agencies

LA16-9
(cont'd)

The failure to describe the air quality impacts of the proposed Project is a critical omission. Ozone is harmful to human health and the environment, and, as described in detail below, the ozone emissions from the proposed Project would result in significant air quality impacts.

B. The DEIS Fails to Describe the Baseline Environmental Condition of the Basin Under a 1332 Wobbe Index Standard.

LA16-10

The DEIS provides a general comparison of the NOx emissions from burning natural gas to the emissions that would result from the use of *other* fossil fuels, such as fuel oil and coal. DEIS, pp.3-4 to 3-5. In particular, the DEIS suggests that delivery of 2.9 Dth/d (or the equivalent of 2.7 Bscf/d) of natural gas, the amount of gas that the proposed Project would deliver, would result in 44,698 tons per year (or 122.5 tons per day) of NOx in southern California markets. *Id.* p.3-5. It is impossible to determine from the DEIS, however, whether the estimated NOx emissions reflect high Wobbe Index gas that would be imported by the Project. Thus, it is impossible to provide informed public comment on the quality of the analysis in the DEIS. The DEIS recognizes that “there are emissions associated with producing, processing, transmitting, and distributing natural gas and other fossil fuels . . .” *Id.* The DEIS also admits that “credible estimates of air emissions can be developed based on reasonable assumptions regarding burning natural gas delivered by the Project . . .” *Id.* It is mandatory that the DEIS contain such reasoned analysis.

Moreover, while the DEIS uses the emissions estimate to support its conclusion that emissions from the proposed Project would be less than emissions from the use of

Local Agencies

16

LA16-10 Section 4.12.2 includes a discussion of the existing air quality in the Project area. This discussion does not include a discussion of non-Project areas. As discussed in the response to comments PM1-1 and LA16-1, it is beyond the scope of the EIS/EIR to include an environmental analysis of the potential end use of the natural gas that would be transported on the North Baja system; therefore, the baseline environmental condition of the SCAB is not discussed in the EIS/EIR.

The information in Table 3.2.1-1 provides a general comparison between the differences of burning natural gas, fuel oil, or coal given an estimated amount of fuel oil or coal that would be equivalent to the burning of 2.7 Bscfd of natural gas, 365 days per year. The fuel and equipment information was based on data available from the EPA's AP-42 and RBLC database.

LA16-10
(cont'd)

other fossil fuels, the DEIS does not describe the existing environmental condition in the Basin. In particular, the DEIS does *not* compare NOx emissions from the proposed Project to the NOx emissions that occur under the existing baseline environment, or a 1332 Wobbe Index average.

CEQA explains that the “environmental setting” of a project supplies the “environmental baseline” that a lead agency then employs in analyzing whether a proposed project will have a significant environmental effect. *See* 14 Cal. Code Regs. § 15125(a). The environmental baseline describes “the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published” *Id.* An accurate description of the environmental baseline is critical to a fair and accurate determination of the potential impacts of a proposed project. The courts have “widely accepted” the principle that “the significance of a project’s impacts cannot be measured unless the EIR first establishes the actual physical conditions on the property.” *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors*, 87 Cal.App.4th 99, 125 (Cal. Ct. App. 2001).

In the instant matter, the DEIS ignores the environmental baseline of air quality in the Basin, which is based on 1332 Wobbe Index gas. Thus, even assuming that the NOx emissions estimate in the DEIS accurately states the emissions that would occur under the proposed Project, the DEIS does not provide sufficient information on which the decision makers could make a reasoned analysis of whether the emission of 44,698 tons per year (or 122.5 tons per day) of NOx would cause a significant air quality impact as compared to the existing environment.

Local Agencies

LA16-10
(cont'd)

Fundamentally, the purpose of environmental review is to provide decision-makers with the information necessary to make an informed decision on whether or not to approve a project. *See Laurel Heights Improvement Ass'n v. Regents of the Univ. of Calif.*, 47 Cal. 3d 376, 392 (Cal. 1988) ("Laurel Heights I"); *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Calif.*, 6 Cal. 4th 1112, 1123 (Cal. 1993) ("Laurel Heights II"). "CEQA requires a good faith effort at full disclosure A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process." *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 712 (Cal. Ct. App. 1990). A lead agency's ultimate decision regarding project approval is a "nullity" if it is based upon an EIR that fails to provide decision-makers and the public with the information that CEQA requires. *Save Our Peninsula Comm.*, 87 Cal. App. 4th at p.118 (quoting *San Joaquin Raptor/Wildlife Rescue Center*, 27 Cal. App. 4th at pp.721-22). It is simply inconceivable that the Agencies could make a decision to approve the Project with essentially no reliable information about how the Project would harm air quality in the Basin.

LA16-11

C. The Proposed Project's Ozone Emissions Would Result in Significant Air Quality Impacts.

Although the DEIS is bereft of analysis, substantial evidence otherwise available suggests that the proposed Project would result in significant air quality impacts. For example, even 1.2 tons of NOx emissions per day would far exceed the emissions from a new 800 MW power plant and would be equivalent to the seventh largest NOx source in

Local Agencies

16

LA16-11

The Agency Staffs acknowledge the possible adverse impacts on human health and the environment in areas exceeding the Federal 8-hour ozone standard such as the SCAB. However, as discussed in the responses to comments PM1-1 and LA16-1, it is beyond the scope of the EIS/EIR to include an environmental analysis of the possible end use of the gas that would be transported on the North Baja system. See also the response to comment PM1-4.

LA16-11
(cont'd)

the Basin. *See* Exhibit G [CPUC Tr. p.806, lines 19-27 (cross-examination of Sempra witness Hower)]. That amount would greatly exceed the significance level of 55 pounds of NOx per day that the District has established for its own CEQA compliance. *See* Exhibit H.

Ozone exposure over the federal 8-hour air quality standard is damaging to human and animal health. For example, exposure over the primary standard results in: (1) pulmonary function decrements and localized lung edema in humans and animals; (2) risk to public health implied by alterations in pulmonary morphology and host defense in animals; (3) increased mortality risk; and (4) risk to public health implied by altered connective tissue metabolism and altered pulmonary morphology in animals after long-term exposures and pulmonary function decrements on chronically exposed humans. Exhibit A [AQMP, Table 2-1; Appendix I].

Individuals exercising outdoors, children, and people with preexisting lung disease, such as asthma and chronic pulmonary lung disease, are considered to be the most susceptible sub-groups for ozone effects. *Id.* [AQMP, p.2-8; Appendix I, pp.I-3 to I-4]. For example, an increased risk for asthma has been found in children who participate in multiple sports and live in high ozone communities. *Id.* [AQMP, p.2-8; Appendix I]. In particular, children in southern California have eight percent less lung capacity than children who grow up in cleaner environments due, in part, to poor air quality. *See* Exhibit G [CPUC Tr. p.728, lines 19-23 (testimony of the District's Dr. Liu)].

Local Agencies

LA16-11
(cont'd)

Elevated ozone levels are associated with increased school absences. Exhibit A [AQMP, p.2-8; Appendix I]. For example, the Children's Health Study, conducted by researchers at the University of Southern California, followed a cohort of children that live in 12 communities in southern California with differing levels of air pollution for several years. The researchers found that school absences in fourth graders for respiratory illnesses were associated with ambient ozone levels. An increase of 20 ppb ozone was associated with an 83 percent increase in illness-related absence rates. *Id.* [AQMP, Appendix I, p.I-3].

In recent years, a correlation between elevated ambient ozone levels and increases in daily hospital admission rates, as well as mortality, has also been reported. *Id.* [AQMP, p.2-8; Appendix I]. These excess hospital room admissions and emergency room visits are observed when hourly ozone concentrations are as low as 0.08 to 0.10 ppm. *Id.* [AQMP, Appendix I, p.I-3].

In addition to human and animal health, ozone exposure over the federal standard also results in vegetation damage and property damage. *Id.* [AQMP, Table 2-1].

Without this crucial information and analysis concerning the air quality impacts of the proposed Project, there can be no reasoned and informed decision-making regarding the environmental impacts resulting from the Project. *See Laurel Heights II*, 6 Cal.4th at p.1123; *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 564 (Cal. 1990) (the EIR process "protects not only the environment but also informed self government"); *see also* 14 Cal. Code Regs. § 15002(a)(1) (one of the "basic purposes" of CEQA is to inform decision-makers and the public about the environmental consequences of their

Local Agencies

LA16-11
(cont'd)

projects). Here, the DEIS simply does not provide any information on which the decision makers could determine that the Project would not result in significant air quality impacts or that such impacts have been mitigated.

LA16-12

D. The Proposed Project Would Bring New, Hotter Gas to the Basin, Rather than Merely Replace Existing Sources of Gas.

The proposed Project would not merely replace/displace an existing source of natural gas. It would add significantly increased capacity to the existing system to supply an asserted increased demand for natural gas. *See* DEIS, p. ES-2 [existing pipeline capacity 512,500 Dth/d; proposed Project capacity 2.9 Million Dth/d]. As the DEIS admits, the proposed Project would interconnect with SoCalGas to “provide markets in California and the Southwest with access to LNG-source gas, either physically or through displacement.” *Id.* p.1-4. The proposed Project would “deliver[] an alternative or *additional* source of natural gas to existing natural gas users.” *Id.* p. ES-23 [emphasis added]; *see also id.* p.1-3 [declaring that the Project would provide “an entirely new source of natural gas supply”]. The DEIS explains that the proposed Project would “expand the current capacity” of the existing pipeline, (*id.* p.1-2), and “expand [the] existing natural gas transmission pipeline system.” *Id.* p.2-1. The DEIS also suggests that the proposed Project, unlike the No Project Alternative, is intended to “meet the growing demand for natural gas in California and other southwestern U.S. markets.” *Id.* p. ES-26; *see also id.* p.3-3 [No Project Alternative, unlike the proposed Project, would “not be able to provide transportation for LNG-source natural gas from the Mexican pipeline system into the United States to meet the demand for natural gas in California”]. It explains that

Local Agencies

16

LA16-12 See the responses to comments PM1-1, PM1-4, LA16-1, and LA16-6 through LA16-8.

Local Agencies

16

LA16-12
(cont'd)

“[t]he demand for natural gas in California, as in the rest of the United States, is expanding.” *Id.* p.1-3.

The DEIS fails to provide critical information about how the proposed Project would fit into the natural gas supply system in Southern California and Arizona. For example, the DEIS does not explain the existing sources and amounts of natural gas supply in the Basin, whether the existing system is operating at capacity, whether the existing system satisfies current demand, and where existing sources of supply would be diverted to if the proposed Project were to displace, rather than supplement, existing supply. This information is a prerequisite to a reasoned analysis of the environmental impacts of the Project.

Even if the Project’s imports merely displace existing supplies of natural gas, however, the replacement supplies of LNG would have a higher Wobbe Index and, thus, would be hotter than existing gas supplies which make up the baseline of comparison. Because this new source of gas would be hotter than the existing supply, the effect necessarily would be to increase NOx emissions and result in air quality impacts, unless the Agencies require mitigation.

LA16-13

E. The DEIS Fails to Propose Mitigation Measures to Reduce the Significant Air Quality Impacts.

As detailed above, the proposed Project would result in significant air quality impacts through increased NOx emissions. NEPA and CEQA require the Agencies to consider mitigation measures to reduce these impacts below the threshold of significance. More specifically, NEPA requires that “all agencies of the Federal government shall”

LA16-13 See the responses to comments PM1-1, PM1-4, LA16-1, and LA16-6 through LA16-8.

LA16-13
(cont'd)

include in "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official" on not only the environmental impacts of a proposed action, but also alternatives to the proposed action. 42 U.S.C. § 4332(c). The agency must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." *Id.* § 4332(e). CEQA likewise requires the DEIS to identify mitigation measures that would reduce significant impacts. Cal. Pub. Res. Code § 21002 [finding "it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects"].

Because the DEIS fails to recognize that the Project would result in significant air quality impacts, it also fails to consider whether such impacts could be mitigated. Yet, the District submits that feasible mitigation measures to reduce the significant air quality impacts of the proposed Project are available. For example, limiting the Wobbe Index of gas delivered and used in the Basin is a direct and effective way to limit NOx emissions. The Wobbe Index number of LNG can be limited by: (1) importing LNG with an inherently low Wobbe Index number; (2) "stripping" the LNG by removing heavy hydrocarbons, such as petroleum and ethane, at the receiving terminal; and (3) blending the LNG with an inert gas, such as nitrogen. *See* Exhibit I [2006 CEC Report, pp.11, 44];

Local Agencies

Local Agencies

16

LA16-13
(cont'd)

Exhibit A [AQMP, p.4-16]. Thus, there is no technical reason why hotter gas could not be treated before entry into the Basin.

In addition, various members of the natural gas industry have represented that it would be feasible to supply gas at a lower Wobbe Index number and/or treat hotter gas prior to delivery to the Basin. And the District is not aware of any suggestion that the decline in existing supplies of natural gas is imminent.

Finally, particular to the proposed Project, TransCanada is in a position to require its shippers to comply with “the most stringent gas quality standards of any of the pipelines to which the North Baja system might ultimately deliver the gas.” DEIS, p.1-5. Thus, it does not appear that there are any contractual impediments to such conditions. The FERC application says only that the gas imported by the Project would comply with pipeline standards and that TransCanada has committed to “precedent agreements” which would require gas suppliers in its system to meet the strictest applicable gas quality standard. This commitment addresses only a promise to meet applicable CPUC interoperability standards which, as noted earlier, do not themselves address CAA requirements and will, in fact, permit substantial increases in NOx emissions above current levels in the Basin. Thus, TransCanada’s commitment by itself provides no protection to air quality.

F. The DEIS Fails to Prepare a Health Risk Assessment.

The DEIS states that “[a] Health Risk Assessment was not conducted for the proposed Project because it would not result in increased operational emissions.

LA16-14 Conducting a Health Risk Assessment on the potential emissions changes in the SCAB due to the burning of the natural gas that would be transported on the North Baja system is beyond the scope of the EIS/EIR. See also the responses to comments PM1-4 and LA16-1.

LA16-14
(cont'd)

Therefore, the potential for the Project to expose the public to substantial pollutant concentrations . . . would be less than significant.” DEIS, p.4-207.

For the same reasons as described above, the DEIS errs in concluding that a health risk assessment is not required. Quite the opposite: Because there are significant health risks associated with increased NOx emissions, a Health Risk Assessment is required.

LA16-15

G. The Agencies Must Revise and Re-Circulate the DEIS.

Based on the inadequacies discussed above, the DEIS cannot form the basis of a legally adequate final EIS or final EIR under NEPA or CEQA. CEQA requires recirculation when an agency adds significant new information to an environmental document after notice of the DEIR but before certification of the FEIR. *See* Cal. Pub. Res. Code § 21092.1; 14 Cal. Code Regs. § 15088.5. “Significant new information” includes new information regarding the environmental impacts of the proposed Project or new mitigation measures. *See Laurel Heights II*, 6 Cal.4th at p.1130; *see also* 14 Cal. Code Regs. § 15162(a)(1), (3)(B)(1).

Recirculation ensures that the public is afforded a “meaningful opportunity to comment on a substantial adverse environmental effect.” *Laurel Heights II*, 6 Cal. 4th at p.1129. The opportunity for meaningful public review of significant new information is essential “to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom.” *Sutter Sensible Planning, Inc. v. Sutter County Board of Supervisors*, 122 Cal. App. 3d 813, 822 (Cal. Ct. App. 1981); *City of San Jose v. Great Oaks Water Co.*, 192 Cal. App. 3d 1005, 1017 (Cal. Ct. App. 1987). An agency cannot simply release a draft report “that hedges on important

Local Agencies

16

LA16-15 See the response to comment PM1-5.

LA16-15
(cont'd)

environmental issues while deferring a more detailed analysis to the final [EIR] that is insulated from public review.” *Mountain Lion Coalition v. California Fish and Game Comm’n*, 214 Cal. App. 3d 1043, 1052 (Cal. Ct. App. 1989).

Of course, if the EIR is so fundamentally inadequate that meaningful public review was precluded, the EIR must be revised and recirculated. “The revised environmental document must be subjected to the same ‘critical evaluation that occurs in the draft stage’” *Save Our Peninsula Committee*, 87 Cal. App. 4th at p.130-31. Likewise under NEPA, if there remains “major Federal actio[n]” to occur, and if the new information is sufficient to show that the remaining action will “affec[t] the quality of the human environment” in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (2005).

In this case, the significant air quality impacts of the hotter gas that would be imported by the proposed Project have been improperly disregarded in the DEIS analysis. As described above, here the DEIS must be re-circulated because new information about the air quality impacts of the Project and feasible mitigation measures must be included, and because the DEIS remains so fundamentally inadequate that meaningful public review and comment on the air quality impacts has been impossible. Both CEQA and NEPA require that the public have a meaningful opportunity to review and comment upon this significant new information in the form of a re-circulated DEIS.

Local Agencies

LA16-16 **IV. FERC FAILED TO PREPARE AN ADEQUATE CONFORMITY ANALYSIS.**

A. The Regulatory Context of the Conformity Requirements.

Clean Air Act (CAA) Section 176 and its implementing regulations, 40 C.F.R. Parts 51(W) and 93, require federal agencies to assure that their actions conform to any applicable State Implementation Plan (SIP) for achieving and maintaining the National Ambient Air Quality Standards for criteria pollutants and precursor pollutants. *See* 40 C.F.R. § 93.150(a).

Federal agencies must conform their actions to a SIP's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards. Conformity means ensuring that federal actions will not: "(i) cause or contribute to any new violation of any standard in any area; (ii) interfere with provision in the applicable SIP for maintenance of any standard; (iii) increase the frequency or severity of any existing violation of any standard in any area; or (iv) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area" *Id.* § 93.153(g).

Federal actions subject to the conformity analysis broadly include "any activity engaged in by a department, agency, or instrumentality of the Federal government, or any activity that a department, agency or instrumentality of the Federal government supports in any way, provides financial assistance for, licenses, permits, or approves" *Id.* § 93.152 [defining "federal action"]. "Where the federal action is a permit, license, or other approval for some aspect of a non-Federal undertaking, the relevant activity is the

Local Agencies

16

LA16-16 The air quality impacts of construction and operation of the North Baja Pipeline Expansion Project are discussed in Section 4.12.4. Section 4.12.3 of the final EIS/EIR has been revised to include additional information supporting the definition of the Project evaluated for applicability and compliance with the General Conformity Rule. See also the response to comment LA16-1 for additional discussion supporting the definition of the Project evaluated for applicability and compliance with the General Conformity Rule.